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Revisiting the Federal Wire Act on Appeal

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On June 18, 2020, the First Circuit Court of Appeals heard arguments in *New Hampshire Lottery Commission et al. v. Barr et al.*, a case which challenged the DOJ's 2018 reinterpretation of the Wire Act to apply to all or most online gambling, rather than just sports betting. As we await the decision from the appeals court, we take a closer look at the Wire Act and its applicability. Although we don't anticipate the appellate decision will provide much-needed clarity on the Wire Act, we do hope, no matter the outcome, that Congress can be compelled to act and update the Wire Act.

THE WIRE ACT

The Wire Act applies to the transfer of money and information in interstate (or foreign) commerce for use in wagering. It was enacted in order "to assist the various states in enforcing their gambling laws and to aid in the suppression of organized gambling activities." The Wire Act was enacted to assist states in the enforcement of their own laws, and was designed to root out organized crime. Generally, the Wire Act relates to anyone "engaged in the business of betting or wagering" that uses a wire communication "to transmit bets, wagers, or information" relating to bets or wagers on sporting events or contests.

Thus, in interpreting the Wire Act, any analysis generally poses two "engaged in the business of betting or wagering" and (2) Does the underlying business transmit bets, wagers or related information across a wire communication facility?

A. "Engaged in the business of betting or wagering"

The critical element for the Wire Act to apply is whether or not an entity or person is "engaged in the business of betting or wagering". Statutory interpretation of federal law begins with the statute itself. Looking at the plain language, an initial consideration is whether the language is broad enough to

encompass not only businesses that bet and wager, but also businesses that knowingly accept, place, receive or facilitate the bets or wagers of others. Such a broad interpretation would certainly encompass bookmakers (or "bookies"), whose business is to enter into bets or wagers with others and thereby risk loss or stand to win something of value, depending on the outcome of the events bet or wagered upon. But it would also encompass businesses that receive, place or facilitate the bets or wagers of others, such as those businesses which operate pari-mutuel wagering pools or daily fantasy sports platforms. These business have no direct stake in the ultimate outcome of a sporting event.

Such a broad interpretation lacks support in the plain meaning of the statute, as well as in other gambling-related statutes. If Congress had meant for such a broad interpretation, it would have utilized a much broader term, such as *involved* rather than *engaged*. By using the term *engaged*, Congress essentially narrowed the scope of the Wire Act to those businesses whose actual direct business is to enter into bets or wagers with others and thereby risk loss or stand to win something of value depending on the outcome of the events bet or wagered upon.

The appellate court in *United States v. Scavo* further examined this issue, but they did so by looking at the issue from the perspective of an individual not directly involved in the business in question and whether or not said person may be culpable under the Wire Act. In *Scavo*, the appellant, an individual not under the direct control of a bookmaking business, was convicted of engaging in the business of betting or wagering in violation of the Wire Act. The evidence demonstrated the appellant worked on behalf of a bookie by providing the bookie with betting line information over the telephone. The appellant argued that "a person who merely provides line information is not 'engaged in the business of betting or wagering.'" However, the *Scavo* court disagreed. Ultimately, the *Scavo* court found that the appellant and their actions were essential to the operation of the bookmakers' business. Therefore, they had violated the Wire Act by providing the bookie with the required line information in order to operate their business.

B. Transmission of bets, wagers, or related information

Although not defined under the Wire Act, "betting or wagering" has been clearly defined under other related statutes as "[t]he staking or risking by any person of something of value upon the outcome of a contest of others, a sporting event, or a game subject to chance, upon an agreement or understanding that the person or another person will receive something of value in the event of a certain outcome." Federal courts have also routinely recognized that a bet or wager must include: (1) the distribution of prizes; (2) determined on the basis of chance or a future contingent event not under the actor's control or influence; and (3) for a consideration. If, on the other hand, any of these three elements is missing, then the activity would not be prohibited.

C. Carve-outs, Exceptions, and the Safe Harbor

While the Wire Act is broad, there are a handful of exceptions. For example, there is a "newsworthiness" exception which allows the transmission of prohibited information if used for news reporting or sporting events or contests. Another is the safe harbor exception, which allows for the transmission of information across state lines if the "betting on that sporting event or contest" is legal in both jurisdictions. However, the safe harbor exception only applies to the "transmission of information assisting in the placing of bets, not to the other acts prohibited in §1084(a) . . .".

As described above, the Wire Act is an extraordinarily complex statute. Perhaps adding to the complexity, the statute was drafted in the 1960s when President Kennedy sought to disrupt organized criminal activities. Now, with the widespread use of the internet, the Wire Act shows itself to be antiquated and in need of significant revamping from Congress. Regardless of the *New Hampshire* Court's decision, Congress should affirmatively take steps to reduce confusion with respect to the Wire Act.

This article is part of the summer 2020 Esports, Sports Technology & Wagering newsletter update.

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